McNAUGHT

INDEMNITY LANDS OF NORTHERN PACIFIC RAILROAD CO.

RE THE ATTORNEY GENERAL.

NDEMNITY LANDS

OF

thern Pacific Railroad Co.

ARGUMENT

OF

JAMES McNAUGHT,

Counsel N. P. R. R. Co.

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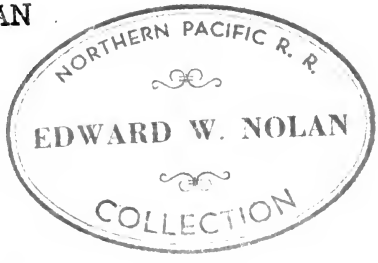

INDEMNITY LANDS.

NORTHERN PACIFIC R. R. CO.

To Attorney General Garland and Solicitor General Jenks:

The honorable secretary of the interior has submitted for your consideration and opinion, two propositions.

First, as to whether the joint resolution of May 31, 1870, created a second indemnity limit.

Second, as to whether selections can be made in the first indemnity limits in a state or territory other than that in which the loss occurred.

I.

In addition to the arguments made by W. K. Mendenhall and the undersigned before the secretary of the interior (which arguments have been by the secretary, with other papers, submitted to you), we desire to cite four additional authorities upon the first proposition:

First. In the case of the Northern Pacific Railroad Company *vs.* the St. Paul & Pacific Railroad Company *et al.*, defendant, and the St. Paul, Minneapolis & Manitoba Railway Company, plaintiff, *vs.* Northern Pacific Rail-

road Company, defendant, Messrs. Biglow, Young, Pinney and Galusha, in their printed arguments filed in the circuit court, district of Minnesota, said: "If any part of the deficiency within the twenty mile limits results from grants, or reservations made by Congress, or pre-emptions, etc., after July 2, 1864, and the deficiency thus resulting can not be supplied within the thirty mile limits, then and in that case only, the company may go ten miles further and select lands to supply it. The company can claim no lands outside of the thirty mile limits except for deficiencies thus resulting from dispositions made by grants, reservations, or otherwise, of lands within the thirty mile limits subsequent to July 2, 1864." The proposition that the said joint resolution created a second indemnity belt, is so plain that the said able counsel for the St. Paul, Minneapolis & Manitoba Railway Company were compelled to concede it. Judge Brewer, in finally deciding the said case in favor of the Northern Pacific Railroad Company, assumed without question tha the said joint resolution created a second indemnity belt. The St. Paul, Minneapolis & Manitoba Railway Company appealed from said judgment, but in said appeal the said company did not assign that portion of the judgment as error. In November, 1887, the appellant in said case filed in the supreme court of the United States a printed argument and motion to advance said case upon the docket, and on page four thereof said "that said joint resolution of May 31,1870, granted additional indemnity limit to the Northern Pacific Railroad Company." When a proposition is so plain that counsel so able concede its correctness adversely to the interests of their clients, but little is left for the courts or departments to do or say upon the subject.

Second. The honorable secretary of the interior, in

his decision of Aug. 15, 1887, *obiter dicta*, said that the word "grant" included place lands only. Judge Love, Circuit Judge McCrary concurring, in the case of Chicago, Milwaukee & St. Paul Railway Company *vs.* Sioux City & St. Paul Railroad Company, said: "Lands in place and the indemnity lands were granted by Congress for precisely the same purpose."

3 McCrary, p. 300.

Third. In your opinion of Nov. 17, 1887, construing the act of Congress of March 3, 1887, you correctly decided that the word "grant" included indemnity as well as place lands.

6 L. D. p. 272.

Fourth. During the first session of the forty-eighth Congress Mr. Henley, for the committee on public lands, reporting in favor of forfeiting the grants to the Northern Pacific Railroad Company, said:

"The grant being for 20 miles along the entire line in all the states and 40 miles in all the territories through which the line might be located, with the right of indemnity selection within ten additional miles, afterwards, by subsequent act (16 Stat. 278), enlarged to 20 miles, for all lands lost in the grant in place."

House Report No. 1256, 1st session forty-eighth Congress.

During the first session of the forty-ninth Congress the committee on public lands made a similar report, and in said report said that the said joint resolution of May 31, 1870, created a second indemnity belt.

House Report No. 1226, dated March 22, 1886.

II.

We will discuss the second proposition presented to

you by the honorable secretary of the interior under two heads.

First. Is the company limited by the twenty-five mile section mentioned in the fourth section of the act of July 2, 1864, in the selection of indemnity lands?

Second. Can selections be made in a state or territory other than that in which the loss occurred?

Said section four reads as follows:

"SEC. 4. *And be it further enacted*, That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminus with, said completed section of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid. * * *."

Said section has no bearing or influence upon the questions submitted for your consideration and opinion, for the reason following:

Said section applies to place lands and not to indemnity lands.

As to the indemnity lands, three steps must be taken

in addition to the requirements of section four prior to the vesting in the company of the right to patents: First, it must be ascertained that there is a deficiency in place lands; second, the secretary of the interior must have prescribed directions under which selections of indemnity lands are to be made by the company; third, the company, under said directions, must have made and filed its list of selections. The right to the patents does not vest until the additional steps above enumerated have been taken, and perhaps not until the selections have been approved by the secretary of the interior.

Grinnell vs. Railroad Co., 103 U. S. 742.

Ryan vs. C. P. R. R. Co., 99 U. S. 382.

Kansas Pacific R. R. Co. vs. Atchison, etc., R. R. Co., 112 U. S. 414.

St. Paul & S. C. R. R. Co. vs. W. & St. P. R. R. Co., 112 U. S. 720.

Kansas City, etc., R. R. Co. vs. Attorney General, 118 U. S. 682.

Cedar Rapids, etc., R. R. Co. vs. Herring et al., 110 U. S. 27.

S. C. & S. P. R. R. Co. vs. C., M. & S. P. Ry. Co., 117 U. S. 406.

As to the lands referred to in said section four, the title vests on the filing of the map of definite location and the right to the patents is perfected on the completion of the road as therein stated.

Buttz vs. N. P. R. R. Co., 119 U. S. 55.

N. P. R. R. Co. vs. Majors, 2 Pac. Rep. 322.

Lilly vs. N. P. R. R. Co., 9 Pac. Rep. 116.

Denny, grantee of N. P. R. R. Co. vs. Dodson. Circuit court for district of Oregon; opinion by Field, associate justice, rendered Nov. 28, 1887.

Deady, district judge, concurring.

This is apparent not only from the entire section, but especially from the use of the words "confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road."

"A confirmation is a species of common law conveyance. It is defined as a deed, whereby a conditional or voidable estate is made absolute and unavoidable by the confirmer, so far as he is able, or whereby a particular estate is increased."

N. P. R. R. Co. vs. Majors, 2 Pac. Rep. 333.

2 Blackstone Comm. 325; Coke, Lit. 295 b.

1 Abbott's Law Dictionary, 263.

There would be no doubt as to the correctness of this proposition were it not for the word "conveying" used in the latter part of said section. Conveyance is a generic word of which confirmation is the species. Its operative words includes those of feoffment, which is also a species of conveyance.

The supreme court of Montana territory correctly say:

"We think, therefore, when the word 'conveying' was used in the latter portion of section 4, it was employed as synonymous with the language used in the first portion thereof, viz.: 'confirming the right and title.'"

Northern Pacific R. R. Co. vs. Majors, 2 Pacific Rep. 322, 333.

The solicitor general, Mr. Jenks, when assistant sec-

retary of the interior, Aug. 13, 1885, correctly said of section four:

"From these provisions, as the railroad company completed each consecutive twenty-five miles of road, upon the report of the commissioners, the grant must be *confirmed* by patents for the land on each side of the road corresponding with the section of the road completed."

5 L. D. 459.

Said decision by the assistant secretary is correct in every particular. It must be remembered, however, that it applies to the terminal limits of intermediate sections of the road, and not to the termini of the whole road. The honorable secretary of the interior, Oct. 7, 1887, in adjusting the grant of the Chicago, St. Paul, Minneapolis & Omaha railroad, said to Commissioner Sparks:

"I think you have misapprehended both of these decisions, if they have led you to the adoption of the terminal line of your map. In the case of the Northern Pacific, the acting commissioner had directed that the general course of the whole length of the line of the road from Spokane Falls to Wallula Junction — a distance of one hundred and ninety miles — should be adopted and a line drawn at right angles therewith for the terminal line at that point. The decision held this to be error, and approved of the revocation of the action of the acting commissioner, and the opinion was expressed that the general course of the last twenty-five miles should have been taken and a line drawn at right angles thereto.

"It should be observed, however, that here the department was not passing upon the adjustment of 'terminal' lines in the sense that they are applicable to the end or extremity of the road. Wallula Junction was not the end of the Northern Pacific road; it was a point to which the road had been constructed on the way to Puget sound, the terminus or extreme end to which its charter authorized it to go. And this department held

in adjusting the terminal line at the point to which the road was constructed, the rule of adjustment, for the purpose of issuing patents, during the construction of the road, prescribed by the fourth section of the granting act, should be followed, and the terminal lines at the end of construction 'should be run at right angles to the general course of the last twenty-five miles of the road.' This was exactly in harmony with the provisions of the statute.

"In the Scott case, the principles upon which railroad grants should be adjusted were most carefully considered. And though the question on which that case came before the department related more particularly to the lateral limits of the road, the principles therein declared are such that they should settle all questions as to the adjustment of both lateral and terminal limits in the sense that the last expression is applicable to the end of a road. It makes the actual road, as located and made, the object and measure of the grant and the base of its locality; and says that none other must be adopted. With the road thus clearly fixed, lines drawn 'perpendicular to it at each end,' as was said in United States *vs.* Burlington Railroad Company, 98 U. S. 340, will determine the final limits without mistake or difficulty."

Mr. Justice Field, Judge Deady concurring, in the case of Denny *vs.* Dodson, Nov. 29, 1887, said:

"'The grant to the Northern Pacific Railroad Company is a float until the filing of its map of definite location. * * * * * Then the grant attaches to the lands in place. It is in this sense that the grant is termed a grant *in præsenti.* * * * The present title here mentioned is a legal title as distinguished from an equitable or inchoate interest arising upon a contract or promise of the government. * * * * The defendant contends that the natural import of the granting terms is qualified and restricted by the fourth section of the act, which provides that whenever twenty-five miles of the road are completed in a good, substantial and workmanlike manner, and commissioners appointed to examine the same have made a report to that effect to the president, patents shall be issued 'confirming to the company the

right and title to said lands situated opposite to and coterminus with the said completed section of the road.' Why, it is asked, is there a necessity of such patents, if the title is passed by the act itself? There are many reasons why patents should be issued on completion of portions of the road. They would identify the lands which are coterminus with the road completed; they would be evidence that the grantee, in the construction of that portion of the road had fully complied with the conditions of the grant, and to that extent the grant was relieved of possibility of forfeiture for breach of its conditions; and they would obviate the necessity of any other evidence of the grantee's title to the lands embraced in them. They would thus be deeds of further assurance confirmatory of the grantee's title, and so be invaluable to them as a source of quiet and peace in their possessions. The word 'confirming' is applied to such patents in section four."

The line of argument used by Justice Field and the entire decision is applicable and applies to place lands, and not to indemnity lands.

Congress, March 3, 1856, in an act entitled "An act making a grant of land to the territory of Minnesota, etc.," among other things provided:

"SECTION 1. *Be it enacted*, etc., That there be and is hereby granted to the territory of Minnesota, for the purpose of aiding in the construction of railroads * * * from Winona, via St. Peters, to a point on the Big Sioux river * * every alternate section of land, designated by odd numbers, for six sections in width on each side of said road; but in case it shall appear that the United States have, when the lines or routes of said road are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said territory or future state, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal

to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached, as aforesaid; * * * *Provided*, that the land to be so located shall, in no case, be further than fifteen miles from the line of said road or branches. * * *

SEC. 4. * * * * * That the lands hereby granted * * * * * shall be disposed of * * * * * only in the manner following: * * * * * That a quantity of land not exceeding 120 sections for each of said roads and branches, and included within a continuous length of 20 miles of each of said roads and branches, may be sold; and when the governor of said territory or future state shall certify to the secretary of the interior that any 20 continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted, not to exceed 120 sections for each of said roads and branches having 20 continuous miles completed as aforesaid, and included within a continuous length of 20 miles of each of such roads or branches, may be sold; * * *

11 U. S. Stat. 195.

March 3, 1865, Congress, in another act relating to said railroads, among other things, provided: First, that the grant should be increased to ten sections per mile; second, enlarged the indemnity limits to twenty miles, and provided that the lands granted should be indicated by the secretary of the interior.

And by the sixth section provided, as follows:

"SEC. 6. *And be it further enacted*, That the lands hereby and heretofore granted * * * * shall be disposed of by said state for the purposes aforesaid only, and in manner following, namely: When the governor of said state shall certify to the secretary of the interior that any section of 10 consecutive miles of said road is completed in a good, substantial and workmanlike manner, as a first class railroad, * * * * * * the said secretary of the interior shall issue to the said state patents for all the lands granted and selected as aforesaid, not exceeding 10 sections per

mile, situated opposite to and within a limit of 20 miles of the line of said section of road thus completed, extending along the whole length of said completed section of 10 miles of road, and no further. And when the governor of said state shall certify to the secretary of the interior, and the secretary shall be satisfied that another section of said road, 10 consecutive miles in extent, connecting with the preceding section or with some other first class railroad, * * * * * * is completed as aforesaid, the said secretary of the interior shall issue to the said state patents for all the lands granted and situated opposite to and within the limit of 20 miles of the line of said completed section of road or roads, and extending the length of said section, and no further, not exceeding 10 sections of land per mile for all that part of said road thus completed under the provisions of this act and the act to which this is an amendment, and so, from time to time, until said roads and branches are completed."

13 U. S. Stat. p. 526.

July 13, 1866, Congress enacted:

"SEC. 4. *And be it further enacted*, That the lands granted by any act of Congress to the state of Minnesota, to aid in the construction of railroads in said state, specifically, lying in place, on any division of ten miles of road, shall not be disposed of until the road shall be completed through and coterminous with the same; *Provided, however*, That this provision shall not extend to any lands authorized to be taken to make up deficiencies."

14 U. S. Stat. p. 97.

In the case of Barney *et al. vs.* Winona & St. Peter R. R. Co., a railroad company claiming a land grant under the foregoing laws, Mr. Justice Miller, delivering the opinion of the court, said:

"I am of the opinion that, in the selection of these indemnity lands, there is no restriction to coterminous section of twenty miles in length of the road except as that may have been affected by the short period between the passage of the act of March 3, 1865, which did appropriate the lands in place to the construction

of coterminous road, and the passage of the act of July 13, 1866, which exempted from that rule lands selected in lieu of those deficient anywhere."

6 Fed. Rep. 802.

June 3, 1856, an act was passed granting lands to the state of Wisconsin to aid in the construction of railroads in that state. The first section of this act is substantially the same as the first section of the act of March 3, 1857, granting lands to the state of Minnesota, heretofore quoted. Section 4 of this act is as follows:

"SEC. 4. *And be it further enacted*, That the lands hereby granted to said state shall be disposed of by said state only in the manner following, that is to say: That a quantity of land not exceeding 120 sections, and included within a continuous length of 20 miles of roads, respectively, may be sold; and when the governor of said state shall certify to the secretary of the interior that any 20 continuous miles of either of said roads are completed, then another like quantity of land hereby granted may be sold; and so from time to time until said roads are completed."

U. S. Stat. p. 20.

By act of May 5, 1864, the grant was increased for certain of said roads to "every alternate section of public land designated by odd numbers for ten sections in width on each side of said road;" and indemnity allowed for losses in said grant; "*provided*, that the lands to be so located shall in no case be further than twenty miles from the line of said roads." Section 7 of said act reads as follows:

"SEC. 7. *And be it further enacted*, That whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads, * * * * * * patents shall issue conveying the right and title to said lands to the said company en-

titled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed; *Provided, however*, That no patents shall issue for any of said lands unless there shall be presented to the secretary of the interior a statement * * * that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end. * * * * * *."*

13 U. S. Stat. p. 66.

Judge Drummond, in the case of the Madison & Portage R. R. Co. *vs.* The Treasurer of the State of Wisconsin *et al.*, pending before the United States circuit court, western district of Wisconsin, on the nineteenth day of June, 1877, said:

"One of the most important questions that arises is as to the true construction of this section (section 4 of the act of 1856), how the land was to be selected.

"It is claimed on the one hand that, although 120 sections might be sold before any portion of the road was completed (R. R. Land Co. *vs.* Courtwright, 21 Wall. 310), when 20 miles were completed the conditions annexed to the first sale followed that, and the completion of every other 20 miles, and that the land was to be selected by coterminous boundaries.

"It might be, after the completion of the first 20 miles, the grant operated upon 120 sections, provided that number was included in that tier of sections nearest to the completed road; but did that limit the grant if that number could not be found there? I do not think it did.

"I understand that the meaning is that the first 120 sections were to be taken if so many could be found then continuously upon 20 miles of the road, but that the grant afterwards, when 20 miles were built from time to time, did not operate as it did upon the selection of the first 120 sections. Is this the true construction of the section? It seems to me that it is, and that the contemporaneous legislation shows that it is.

* * * If this is the true meaning of the grant made by Congress, then the state is not limited in the grant by coterminous boundaries in the construction of the road, but had the right, whenever the road was in process of construction, and from time to time 20 miles were completed, to make the selection of the land within the boundaries granted, either 'in place,' or within the 'indemnity limits.' * * *

"It is said that the land department of the government has construed this to be distinct grants for three several roads, namely, for a road from Madison to the St. Croix river, and another from St. Croix river or lake to the west end of Lake Superior and to Bayfield; and that the purpose was to limit the terms of the grant for each road to these several termini, so that no land could be taken from the one to supply any deficiency in the other.

"I hardly think that is the true construction of the statute. It seems to me that it was intended to be one line of road, and that the grant of land was made for the purpose of enabling the state to construct that line, and that where there is a deficiency in one part it might be supplied from another.

"Another consideration, perhaps, adds weight to this view of the case. I suppose it to be a fact that, at the time this grant was made, a large portion of the land between Madison and Portage City, and so on to Tomah, had actually been granted by the government; that is to say, it had been purchased and entered by settlers; and it must have been foreseen, therefore, that, as to the southern portion of the road, it was, like the rest, to be constructed, in part at least, by the means Congress furnished. That not much land, or not the full quantity intended to be granted, could be obtained even within the 'indemnity limits' of the southern portion of the line of the road, and which must be presumed to have been known to Congress. * * *

"We now come to the act of 1864. * * * Another important question arises under the act of 1864; that is, how the land was to be disposed of. * * * I understand it is claimed by some of the counsel of the defendants, that the true construction of both grants is that the lands in place and selected must

be coterminous with each consecutive 20 miles finished; and if, in the one instance, there are not 120 sections, and in the other 200 sections, covered by the grant and coterminous with the 20 miles of road, no land can be taken elsewhere from 'place' or 'indemnity limits' to supply the deficiency.

"I hardly think that was the intention of Congress, and certainly not, as was intimated before, of the act of 1856. It seems to me that the object was to make the grant so that the parties who were to construct the various roads should be furnished with the means, so far as the grant could effect that object, to finish the roads. * * * ."

R. R. Land Co. vs. Courtwright, 21 Wall. 310.

See also:

Cedar Rapids and M. R. R. Co. vs. Jewell, 12 Am. and En. R. R. Cases, 277.

Cedar Rapids & M. R. R. Co. vs. Herring et al., 110 U. S. 27.

Swann & Billups vs. Lindsey, 14 Am. and En. R. R. Cases, 504.

Swann & Billups vs. Larmore, 14 Am. and En. R. R. Cases, 519.

U. S. vs. B. & M. R. R. Co., 98 U. S. 334.

U. S. vs. B & M. R. R. Co., 4 Dillon, 297.

Second. Said section four is not mandatory. Under it, it is optional with the company to apply for patents as each section is completed, or wait until the completion of other sections or of the entire road.

Said section is directory. For fourteen years it has been so construed by the presidents of the United States and the secretaries of the interior. Jan. 6, 1873, commissioners were appointed to examine a section of the Northern Pacific Railroad Company's road from the junction with the Lake Superior & Mississippi railroad to Red river, a distance of 228 miles. The

commissioners reported its completion. The then acting secretary, Mr. Cowen, recommended the acceptance of said section and the issuance of patents, and on the same day President Grant approved the said report and recommendations. Aug. 16, 1873, commissioners, duly appointed, reported the construction in a first class manner, of a section of the railroad from Kalama in Washington territory, thence northerly 65 miles. Sept. 8, 1873, the secretary recommended the acceptance of said section of 65 miles and the issuing of patents, and Sept. 10, 1873, President Grant accepted the said section of the road, and approved the recommendations of the secretary. March 5, 1874, commissioners, duly appointed, reported the completion, in all respects as required by the charter, of a section of road 40.1 miles in length, commencing in Thurston county, Washington territory, and ending at Tacoma. May 12, 1874, the secretary recommended the acceptance of the report and the issuance of patents for the lands along said section; and on the same day the president accepted said section of road and approved the recommendations of the secretary. Nov. 29, 1882, commissioners, duly appointed for that purpose, reported the completion in compliance with the law, of a section of the road consisting of 4.58 miles. Dec. 5, 1882, Secretary Teller recommended the acceptance of said section of road, and the issuance of patents; and on the same day President Arthur accepted said section and approved the recommendations of the secretary. Oct 1, 1883, commissioners, duly appointed, reported the completion of a section of road from Kalama to Portland, a distance of

36.31 miles. Oct. 4, 1883, the secretary recommended the president to accept the same, and on said day the president of the United States accepted the said section of the road and approved the recommendations of the secretary. Dec. 8, 1884, commissioners, duly appointed, reported upon two sections of road, one 2 miles and the other 35 miles, all in Washington territory. On Dec. 19, 1884, Acting Secretary Joslyn received the report of the commissioners, forwarded the same to the president of the United States, with the recommendation that the said sections of the road be accepted, and on said day President Arthur approved said recommendations. Feb. 6, 1885, commissioners, duly appointed to accept the section of the road 37.5 miles in length, from Ashland, in Wisconsin, westwardly, reported the same as duly completed; and on the same day Secretary Teller recommended the acceptance of said section of road, and the president of the United States approved said recommendations. May 24, 1886, commissioners, regularly appointed, reported the completion, in compliance with the charter, of 40 miles of the road in the Yakima valley in Washington territory, and on the same day Secretary Lamar transmitted the report to the president of the United States, with the recommendation that the said section of road be accepted; and on May 28, 1886, President Cleveland accepted said section of the road, and approved the recommendations of Secretary Lamar. Nov. 30, 1886, another report, by another set of commissioners, duly appointed, was duly made, in which they found another section of the Cascade branch of the Northern Pacific railroad, consisting

of 40 miles, duly completed, and on said day Secretary Lamar transmitted to President Cleveland the said report, with a recommendation that the said section of 40 miles of said road be accepted; and on Dec. 7, 1886, the president of the United States duly accepted said section of 40 miles and approved the recommendations of the secretary. This practical construction of the company's charter for 14 years by the president of the United States and the interior department, whose duty it was and is to construe the law and participate in carrying its various provisions into effect, is entitled to very great consideration.

See authorities cited on pages 11, 12, 13, 14, 15, 16, 20, 21, 22, 23, of the argument made by the undersigned before the secretary of the interior Oct. 24, 1887.

The Burlington & Missouri River railroad grant provides that said road shall be constructed by sections. The twentieth section of the act reads as follows:

"SEC. 20. *Be it further enacted*, that whenever said Burlington & Missouri River Railroad Company shall have completed twenty consecutive miles of the road mentioned in the foregoing section, in the manner provided for other roads mentioned in this act, and the act to which this is an amendment, the president of the United States shall appoint three commissioners to examine and report to him in relation thereto; and *if it shall appear to him that twenty miles of said road have been completed as required by this act, that upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company on each side of said road, as far as the same is completed, to the amount aforesaid, and such examination, report and conveyance, by patents, shall continue from time to time in like manner, until said road shall have been completed.*"

13 U. S. Statutes, 356.

Under said act of Congress, selections were made on the extreme western end of the road in Nebraska for losses on the eastern end. Patents were issued for said lands. The United States filed a bill in equity to set aside the patents for one reason, among others, that selections could not be made except in the twenty mile section where the loss occurred, and that selections could not be made on the western end of the road for losses on the eastern end. Upon said questions, the supreme court of the United States said:

"The position that the grant was in aid of the construction of each section of twenty miles taken separately, and must be limited to land directly opposite to the section, is equally untenable. The grant was to aid in the construction of the entire road, and not merely a portion of it, though the company was not to receive patents for any land except as each twenty miles were completed. The provision allowing it to obtain a patent then was intended for its aid. It was not required to take it; it was optional to apply for it then, or wait until the completion of other sections, or of the entire road. The grant was of a quantity of land on each side of the road, the amount being designated at so many sections per mile, with a privilege to receive a patent for land opposite that portion constructed as often as each section of twenty miles was completed. If this privilege were not claimed, the land could be selected along the whole line of the road without reference to any particular section of twenty miles."

U. S. vs. B. & M. R. Co., 98 U. S. Reports, p. 340.

The grant to the Burlington & Missouri River Railroad Company, as to the questions under consideration, is in all respects like that of the Northern Pacific. See the analysis thereof and the authorities cited on pages 39, 40, 41 and 42 of the argument made by the undersigned, Oct. 24, 1887.

Section 4 of the granting act of the California & Ore-

gon Railroad Company provides for the building of said road in sections, and the issuing of patents as said sections are completed. Section 2 of said act contains an indemnity provision. In the construction and acceptance of said road, no attention whatever was paid to said provisions of section 4. In 1870 commissioners were appointed to report upon a section of the road consisting of 77.6 miles. The commissioners reported the completion of said 77.6 miles in all respects as required by the law. The secretary of the interior transmitted the report to the president of the United States with a recommendation that the same be accepted and the patents issued thereon. The said report was approved by the president of the United States; and in 1871 selections were made in the indemnity belt indiscriminately, for losses occurring at any place within the place limits of said road as constructed. Patents were issued for said lands so selected; and the right to make such selections and the validity of its patents were involved in the case of Ryan *vs.* Central Pacific Railroad Company, 5 Sawyer, 265. That able circuit judge said:

"Congress manifestly designed the grant to be for the full amount of land indicated; and the only object of any exception at all of the classes mentioned, was to prevent interference with rights existing in others. The exception was not designed to limit the grant. * * * * That the company might get its full quantity, Congress authorized it to make up any deficiency by reason of any prior right that might have attached to any lands specifically designated, by selecting other lands outside the designated limits. The intention was to give the full amount of land designated, and the only care of Congress was not to interfere with rights already vested and still existing. * * * Any less favorable construction would

practically nullify this grant along a large portion of the line, or any other grant in similar terms throughout a large portion of the state. * * *
The grant now in question was intended to be substantial, not a mere delusion and the act should be construed as it was intended to be understood by Congress at the time it was passed. * * * *
Any construction which shall deprive the defendant of the lands which it reasonably had a right to expect under the act of Congress, would wrongfully wrest from it, by judicial sanction, a large portion of the consideration which formed the inducement to the undertaking."

The second section of said act of Congress reads as follows:

"SEC. 2. *And be it further enacted*, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the secretary of the interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first named alternate sections." * * * *

14 Stat. at Large, 239.

The granting words and indemnity provisions are, in all particulars, like those of the Northern Pacific. Of said section Judge Sawyer and the judges of the supreme court of the United States, say: "The intention was to give the full amount of land designated." The amount designated is twenty sections per mile.

We are not now arguing that the Northern Pacific Railroad Company is entitled to twenty or forty sections per mile regardless of the curvature or sinuosity of its road, but we are arguing that the grant should receive that construction which will enable the company to obtain the number of sections mentioned in the grant if they were ever in place and within the enumeration found in section 3, for which selections might be made. In the acts granting lands to the states the grants are generally of the alternate sections within a certain limit with the right to select for certain specific losses within a larger limit. The courts and the department in construing such grants have uniformly said that the object in creating the indemnity or larger belt is to enable the company to obtain in that indemnity or larger belt the specific losses in place limits; and such construction has been placed upon such acts as to carry out that legislative intent. The intention of Congress in the grant to the Northern Pacific is more plainly expressed than in any of these earlier grants. It is a grant to the amount of ten sections in the states and twenty in the territories on each side of the road. In the argument made Oct. 24, 1887, we analyzed the Burlington & Missouri River grant, which is confessedly one of quantity. The only difference, as there shown, between the grant to the Northern Pacific and that to the Burlington & Missouri River Railroad Company is that the limitations are expressed in the one and implied in the other. The only argument that is possible to be made on behalf of the government on the grant to the Northern Pacific is that it is a grant of twenty sections in the state and forty in the terri-

tories, provided that number of sections ever existed in the place and indemnity limits prescribed in the act. The grant of the alternate sections to the amount of twenty sections in the state and forty in the territories would be purely a grant of quantity were it not for the provisions in said section 3, that the place lands must be taken within a certain limit, and the claim that selections can only be made in the indemnity limit for certain losses in the place limits. One object of using the word "amount" in section 3, as stated by Circuit Judge Sawyer, is to plainly and clearly indicate the intention of Congress not to limit the company to sections of its road, in its right to select in the indemnity belt.

The doctrines of *res adjudicata* estoppel, and the rules of statutory construction hereinafter applied to the second proposition submitted for your consideration, are applicable to the point we have been considering; and hereafter, to a great extent, we will consider the propositions together.

II.

Can selections in the first indemnity limit be made in a state or territory other than that in which the loss occurred.

In considering this proposition we assume that the joint resolution of May 31, 1870, created a second indemnity limit; that it conferred the privilege upon the company of going into that second indemnity belt for certain classes of losses, provided they could not be found in the first; that this additional privilege so conferred, for the reasons hereafter stated, did, and does,

not limit or repeal the right of selections conferred upon the company by the original charter. Section 3 of the charter approved July 2, 1864, reads as follows:

"SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * * *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided." * * *

We will discuss the said second proposition and said section 3 under the following heads:

1. The indemnity belt provided for in said section 3 is not limited by state, territorial, twenty-five mile or

other section, and the department has neither right nor authority to divide said belt into sections or limits not prescribed in the charter.

2. Estoppel.

3. Res judicata.

First: In the first section of the act of July 2, 1864, it is provided that "said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin; thence westerly, by the most eligible railroad route, as shall be determined by said company, within the terrritory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound."

And in section 2, the right ot way for said continuous line of road is granted. And in section 3, the odd sections, to the extent of ten in the states and twenty in the territories, on each side of said continuous line and right of way are granted, if found in place; and if not, the right to select for those reserved, sold, granted, or otherwise appropriated prior to the time of filing the map of definite location, in the indemnity limit in said section is provided for. The selections are to be made in a belt ten miles in width within the termini of said road. They are to be made by the company under the directions of the secretary of the interior. The belt of limit is described as a space not more than ten miles "beyond the limits of said alternate sections." The words "the limits of said alternate sections" apply unquestionably to the entire number of sections granted the company, from Lake Superior to the sound. No other

alternate sections are referred to in said section 3, or in said act of Congress, to which the words "said alternate sections" can apply, except the entire number along the continuous line of road provided for in said sections 1, 2, and 3. No limit is here prescribed as to the place of selecting indemnity lands, except that the selections shall be made of the odd numbered alternate sections in a space not more than ten miles beyond the limits of said alternate sections. The specific mention of the limitation, that the selections shall be made within a space of ten miles in width and along said alternate sections, is the exclusion of all other limitations. "*Expressio unius est exclusio alterius.*" Under said section agricultural, timber, coal and iron lands may be selected. The second proviso to section 3 contains a further limitation upon the right of selection, and makes plainer the rule we are contending for. Under that proviso, selections for mineral land losses can not be made of timber, coal or iron lands. They can only be made of unoccupied and unappropriated agricultural lands. They must be the odd numbered public sections "nearest the line of said road as above provided." "Nearest the line of the road" has been uniformly construed to be the nearest public odd numbered sections in the indemnity belt, and in that sense "nearest the line of the road" is synonymous with "not more than ten miles beyond the limits of said alternate sections." Perhaps there may be a distinction. Selections for mineral losses must be taken out of the first tier or tiers of sections adjoining lands in place along the line of the road, while as to all other selections, they may be made at

any place in the indemnity limit. These specific limitations and qualifications certainly exclude all others. The supreme court of the United States, in the case of United States *vs.* Burlington & Missouri River Railroad Company, said: "There is here no limitation of distance from the road within which the selection is to be made, and the court can make none."

98 U. S. 339.

This rule is applicable here. No limitation is prescribed in the acts within which selections are to be made except as above enumerated, that they must be within said indemnity limit; and the interior department can not make qualifications and limitations not provided for and prescribed in the act. "The grant was to aid in the construction of the entire road, and not merely a portion of it." The right conferred upon the company by said section 3 is to make selections within a certain indemnity belt, and not within portions or parts of that belt.

98 U. S. 340.

4 Dillon's Circuit Court Reports, 297.

It will be conceded that the company has the right to select in the indemnity limit coterminus with a section of the road as constructed and accepted by the president of the United States, for a loss occurring elsewhere within said section. On Nov. 18, 1881, a section of the road running from the Little Missouri river in Dakota to a point in Montana, seventy-five miles west of said river, was examined and accepted. The secretary of the interior recommended that the patents be issued for said lands, and the president of the United

States approved said recommendations. Nov. 26, 1881, another section of the said road two hundred miles in length was accepted by the president, extending from Wallula, Washington territory, to Eight Mile Prairie in Idaho territory. Aug. 31, 1882, a section running from a point near Thompson, Minn., to Superior City, Wis., was in the same manner approved, accepted, and the patents directed to be issued. Oct. 9, 1882, another section was accepted and patents recommended to be issued in the same manner, extending from Idaho into Montana. No reason can be suggested why a selection for indemnity in Idaho can not be made for a loss occurring in the same section of the road, immediately across the territorial line. No reason can be assigned why a selection can not be made in the indemnity belt on the eastern end of the section extending from Wisconsin into Minnesota for a loss on the western end of said section. In construction, state and territorial lines are not known or recognized. No attention whatever has been paid to them in the acceptance of said sections by the interior department or the president of the United States. The land therein is common to the road, and granted in Wisconsin as well as Minnesota for the same purpose. The loss to the government is the same, no matter where the selection is made. The advantage to the government by the construction of the road and securing it for postal and military purposes, is neither enlarged nor diminished by selecting in one state for a loss in another. This proposition is very clearly established by the decisions of the interior department and the courts in relation to the Winona & St. Peters Railroad Company. The grant to that company, with

provisions, as we have heretofore shown, requiring the road to be constructed in sections, extends from Minnesota into the territory of Dakota. That grant is peculiar in this: It was made to the territory of Minnesota for the construction of a road, the termini of which was within the then territorial limits, but which, at the time of the grant, as is clearly indicated therein, it was the intention of Congress should be located partly in the future state of Minnesota and territory of Dakota. The grant was made on the third day of March, 1857. On the twenty-sixth day of February, 1857, a week prior to the grant aforesaid, Congress passed an enabling act for Minnesota. (11 Statutes at Large, p. 166.) By this enabling act, the western boundary of the proposed new state of Minnesota was designated where it was afterwards established and now exists. Under that enabling act, the state was organized and admitted into the Union in the succeeding year. In the case of the St. Paul, Minneapolis & Manitoba Railway Company *vs.* Phelps, speaking of the intention of Congrsss relative to the grant made March 3, 1857, and the said state boundary, Judge Brewer said:

"*I think it obvious that Congress had in view the probable organization of Minnesota as a state under the enabling act just passed. It speaks of the future state of Minnesota as though the admission of a state with that name was to be soon expected.* * * * * * *
I am aware that in this act provision was made for a road running beyond the western boundary of the proposed state and into the present territory of Dakota, with a grant of adjacent lands, which could be satisfied only by lands in Dakota, and which was in fact so satisfied. But the fact that Congress provided for a road outside of the state limits does not make against the claim that it intended only the ordinary provision for a road wholly within the state."

26 Federal Rep. 569.

The road spoken of by Judge Brewer as extending beyond the boundary of the state into the territory of Dakota is the Winona & St. Peter railroad. The provisions of the act of Congress requiring the road to be constructed in sections, have been in this argument cited. Under the act of March 3, 1857, said company was permitted by the department to select 200,000 acres in Dakota for losses in Minnesota.

The opinion of Judge Brewer that Congress, in making the grant of March 3, 1857, must have intended to provide for the construction of the railroad beyond the limits of the state, is sustained by the history of every territory heretofore admitted into the Union as a state. No instance can be cited were the people of the territory rejected an act of Congress permitting them to form a state government. Every such offer on the part of the federal government has been eagerly accepted by the people to whom it has been addressed. When Congress was framing the language of the grant of March 3, 1857, that body had no more reason to, and probably did no more, doubt that the state of Minnesota would speedily come into the Union under the enabling act of February 26th of that year, than that the dome of the capitol in which it was sitting would stand for the ensuing fifteen minutes only. It may be further observed that Congress enlarged said grant, increasing it from five to ten sections per mile. 13 Statutes at Large, 526. This grant was made long after the admission of the state and organization of Dakota territory. Selections under said act were made in Dakota for losses in Minnesota. Of said grant, Mr. Justice Field, speaking forthe supreme court, said:

"Nor was it the purpose of Congress to lessen the extent of its aid because it might ultimately be found that, at the time of its grant, or when the route was determined, portions of the land designated had already been disposed of or pre-emption rights had attached to them. The policy of the government was to keep the public lands open at all times to sale and pre-emption, and thus encourage the settlement of the country, and, at the same time, to advance such settlement by liberal donations to aid in the construction of railways. The acts of Congress, in effect, said: 'We give to the state certain lands to aid in the construction of railways lying along their respective routes, provided they are not already disposed of, or the rights of settlers under the laws of the United States have not already attached to them, or they may not be disposed of, or such rights may not have attached when the routes are finally determined. If at that time it be found that of the lands designated any have been disposed of, or rights of settlers have attached to them, other equivalent lands may be selected in their place, within certain prescribed limits.' The encouragement of settlement by aid for the construction of railways was not intended to interfere with the policy of encouraging such settlement by sales of the land, or the grant of pre-emption rights. It follows that in our judgment the indemnity clause covers losses from the grant by reason of sales and the attachment of pre-emption rights previous to the date of the act, as well as by reason of sales and the attachment of pre-emption rights between that date and the final determination of the route of the road."

Winona & St. Peter R. R. Co. vs. Barney, 113 U. S. 618.

Two propositions are by the supreme court in the foregoing case clearly enunciated, applicable to the Northern Pacific road.

First. In making the legislative grant, it was not the intention of Congress that the grant to the company should be lessened by the ultimate finding by the company at the time of its definite location, that por-

tions of the lands intended to be granted had been disposed of by the government. It was clearly the intention that within the place and indemnity limits provided for, the company should have the amount mentioned in the act, and should have indemnity, to the extent of the losses specifically enumerated. It is only for such specific losses that the Northern Pacific has made its selection. It is only for such specific losses that the company claims the right to go into Wisconsin for losses in Minnesota, or into Dakota for losses in Montana.

Second. That the Northern Pacific Railroad Company, under the original charter, is authorized to make selections for losses occurring before July 2, 1864, as well as between that date and the date of filing the map of definite route. As to losses occurring prior to July 2, 1864, no lawyer will argue that the joint resolution of May 31, 1870, has any bearing, if it is once conceded, which it must be in this controversy, that said joint resolution created a second indemnity belt Said joint resolution is without a repealing clause. It repeals the original charter only so far as there is irreconcilable conflict. As to selections for losses before July 2, 1864, there is no such irreconcilable conflict, even if it be conceded that said joint resolution did not create a second indemnity limit.

It is suggested by way of a dictum in the opinion of the secretary of the interior, that selections can not be made in Dakota for losses in Minnesota, for the reason that by the original charter, 10 sections on each side of said road are granted in the states and 20 in the territories. This contention is fully answered by the opin-

ion of Mr. Justice Field, in the case heretofore in this argument twice cited, of Denny *vs.* Dodson. In that opinion, Justice Field decided that if the road was located in Washington territory adjoining the Oregon boundary, the company would be entitled to its 20 sections per mile on each side of its road, which includes 20 sections per mile of place lands in the state of Oregon on the south side of the road. It would necessarily follow that if the 20 sections per mile were not found in place limits on the south side of the road in the state of Oregon, that the company would have the right to select within the indemnity limits for losses prescribed in the act. Mr. Justice Field's decision clearly answers the claim that only 10 sections per mile on each side of the road can be taken in a state. The location of the road governs as to the amount. The indemnity belt is common to the entire road, without reference to any boundary or limitation, except those specifically prescribed.

It is also claimed that, inasmuch as but half the width of land is granted in the states as in the territories, Congress intended to limit the indemnity to state and territorial lines. Persons making such contention seem to have forgotten that the indemnity limit is the same width, and governed by the same provisions, in the states as in the territories. The grant to the Northern Pacific is specific as to the amount, limitations and losses. That construction should be placed upon it which will give the company the amount specifically named, within the limits specifically enumerated, to the extent of the losses specifically defined. Such has been the construction of every other land grant

by the department and the courts; and no reason can be assigned for departing from that uniform construction in the case of the Northern Pacific.

If state or territorial boundaries are to control the selection limits by implication, without necessity therefor, and contrary to the intent, as clearly shown by the plain language of the granting act and its history, the question will arise as to whether it is the state and territorial boundaries at the date of the enactment of the original charter, July 2, 1864, the joint resolution of May 31, 1870, the filing of maps of definite location, of construction of the road, of prescribing the direction by the secretary under which the selections are to be made, of making the selections, or issuing the patents. Certainly not the date of the granting act, for at that time the entire grant was a float, the company had not accepted the provisions of the act, no rights at that time had vested thereunder. Certainly not at the date of the joint resolution, for it contains no words of limitation as to sections or other boundaries, except those relating to the second indemnity belt. Nor of filing the maps of definite location or construction. The road was not constructed on maps filed in twenty-five mile sections. The sections as constructed did not terminate at the state or territorial boundaries. No attention whatever was paid to such boundaries by the company in filing its map of definite location and the construction of the various sections of road, or by the government in the acceptance of said maps and sections. The date of prescribing directions for the selections by the interior department can not govern; such instructions and selections have been changed several

times and will probably be further modified before the selections are all completed. The date of the selections can not govern. They have been made at different times, in different land districts, as the various directions were changed. The original directions required the company to file with its selections a list of its losses. Selection lists were filed under said directions. Subsequently the directions were changed and the company was required to file its selections without designating its losses. Under said directions the company filed new selection lists. In 1885, said directions by the department were a third time changed, and by said directions the company was required to file its selection lists, accompanying the same with a designation of its losses. Territorial and state boundaries, at the date of issuing patents, can not apply for the reason that a number of patents have been issued, differing in the date.

The boundaries of Dakota, Montana, Idaho and Washington territory have changed in the past, and unquestionably before the surveys along the line of the road are completed by the government, and all of the Northern Pacific selections are made, other changes will take place. A bill passed Congress during its last session annexing Idado to Washington territory, and only failed to become a law by the president's failure to approve it. Bills are now pending in Congress for the division of Dakota, annexing part of Montana to Idaho, etc. Unquestionably selections may be made in Missoula county, in Montana, for losses in Lewis and Clarke county. If the bill now pending in Congress should pass, patents would be issued for such selections so made for lands in Idaho territory for losses in Mon-

tana. The foregoing suggestions are sufficient to show that, if the indemnity belt is divided by state or territorial boundaries, the company's rights are not fixed by the charter, filing of the map of definite location or the construction of the road and the acceptance by the company of the terms and conditions of the act of July 2, 1864, and the resolutions amendatory thereof; and that the quantity of land granted, or intended to be granted, does not depend upon the granting clause and the provisions and limitations plainly expressed in the act, but to a great extent depends upon the establishment in the future of territorial and state boundaries. It must be conceded that if Idaho and Washington territories were united as one territory, that the territorial boundary line would be obliterated and selections could be made any place within the indemnity belt in that territory for losses in another. Surveys of the lands are provided for in section 6 of the company's charter without reference to territorial or state boundaries, or twenty-five mile sections. That section requires surveys to be made forty miles in width on each side of the entire line when the general route is fixed as fast as the road is constructed.

It may be further observed that the vesting of the title to the place lands in the company is not dependent upon the completion of sections of the road, or the territorial or state lines. The grant is *in præsenti*, and attaches to the specific place tracts at the date of the filing of map of definite location; but by section 4 the company is restrained from alienating or selling its lands until the completion and acceptance of the sections of the road coterminus with said lands.

In this connection we desire to pay a little more attention to the act of March 3, 1857, granting lands to the state of Minnesota. The indemnity lands in section 1 of said act are selected "from the lands of the United States nearest to the tiers of sections above specified, etc." The words, "sections above specified," in said act are synonymous with "said alternate sections" used in defining the indemnity belt in the act of July 2, 1864. Section 4 of the act of March 3, 1857, provides that, after the completion of the first 20 miles of road, on the completion of each continuous 20 miles thereafter, the company may sell 120 sections of land for said 20 continuous miles of road as aforesaid; and it is specifically provided in section 4 that the said 120 sections of land must be included within a continuous length of 20 miles of such roads or branches. In the first section of said act Congress provides for the appointment of agents to make selections of lands by the future state. We have shown conclusively by the history of the act that it was the intention of Congress to provide for the building of the Winona & St. Peter road into the territory of Dakota; notwithstanding such an intention, and the requirement that the road should be constructed in sections of twenty miles, the interior department and the courts have uniformly held under said act that selections could be made in Dakota for losses in Minnesota. In fact there were no losses in Dakota within the limits of said grant and all the selections of the Winona & St. Peter road made in Dakota were for losses in Minnesota.

It is further suggested that if the company's con-

struction of the act is correct, the railroad would obtain lands in a territory or state for the construction of a railroad in another. This proposition is conceded. Our contention is that we are expressly authorized to do that by the granting act. Mr. Justice Field, in the case of Denny *vs.* Dodson, heretofore cited, said expressly that the company was entitled to the grant of lands in the state of Oregon for a road constructed in Washington territory. The Cascade branch of the Northern Pacific railroad, no part of which is in the state of Oregon, but the whole thereof is in the territory of Washington, is the road involved in said decision.

If Congress intended that the company, by its original charter, should be limited in selections to sections of twenty-five miles, or state or territorial boundaries, it would certainly have so prescribed, as it did in the joint resolution of May 31, 1870, in extending the additional privilege to the company of selecting in the second indemnity belt. Congress expressly limited the company in the exercise of such privilege to the state or territory in which the loss occurred.

A brief reference to other grants made by Congress at and near the time of the adoption of the Northern Pacific Railroad Company's original charter, will materially aid one in construing the indemnity provisions of the act of July 2, 1864. In making the grant to the California & Oregon Railroad Company July 25, 1866, 14 Statutes at Large, 239, Congress, in the second section of said act, enacted:

"The lands herein granted shall be applied to the building of said road within the states, respectively, wherein they are situated."

No such language is found in the charter of the Northern Pacific, or necessarily implied from any language used therein. In the California & Oregon act Congress found it necessary to make the express statutory reservation. The insertion of such a provision in the California & Oregon grant and the omission of it from the Northern Pacific grant, is a strong circumstance showing that Congress, in the Northern Pacific act, did not intend such a limitation. The suggestion that the Northern Pacific is limited to state or territorial lines has for its foundation the fact that in over nine-tenths of the grants made to aid in the construction of railroads in the United States, the grant has been made either to the state or territory in which the road is located, or to a road with its termini in a state or territory. There is certainly nothing in the Northern Pacific charter from which such a limitation can be fairly, or otherwise, inferred. The Northern Pacific road is continental. The grant, as we have said, is made to aid in the construction of the entire road; and it should receive that construction which will enable the company to receive in place and indemnity limits the sections per mile mentioned in the act, if said number ever were in place.

United States vs. B. & M. R. R. Co., 98 U. S. 334.

Same case, 4 Dillon, 304.

Railroad Company vs. Courtright, 21 Wallace, 316.

Barney et al. vs. W. & S. P. R. R. Co., 6 Fed. Rep. 802.

Ryan vs. C. & P. R. R. L. Co., 5 Sawyer, 264.

U. S. vs. C. & P. R. R. Co., 26 Fed. Rep. 482.

N. P. R. R. Co. vs. St. P., M. & M. Ry. Co., 26 Fed. Rep. 558.

Courtwright vs. C. R. R. Co., 5 Am. Railway Rep. 68, 78.

St. P. & C. Ry. Co. et al. vs. Brown, 24 Minn. 517.

4 Brainards Prec. 264.

10 Copps Land Owner, 154.

13 Copps Land Owner, 150.

2 L. D. 513, 516.

Secretary Lamar, in his decision of Aug. 15, 1887, says:

"Internal improvement grants are all of the same general character, having the same great object in view, and are all part of one grand system. Laws having in view the same general purpose should be construed in *pari materia* unless the intention of the legislature is plainly shown to be otherwise. Indeed, were an ambiguity in the law, it should be read in the light of the uniform construction of other acts relating to like matters."

In this we fully concur, but, at the same time, in construing the grant to the Northern Pacific it should be constantly kept in mind that more than nine-tenths of all the railroad grants in the United States are local, made to states or territories, or to railroads entirely within a state or territory, while that of the Northern Pacific reaches from the lake to the sound, passing through three states and four territories. But we are content to apply the same rules to the Northern Pacific as have heretofore been applied to other grants. In the Burlington & Missouri River Railroad grant selections of indemnity lands on the extreme western end for losses on the extreme eastern end were sustained by the supreme court of the United States; and on the Winona & St. Peter road selections were allowed in Dakota for losses in Minnesota. But it is said, that by

the gauziest kind of implication, the indemnity limit is divided into sections or by political divisions. There are no express words creating such, or any, division in the indemnity limit. The indemnity limit is continuous and specifically described, after designating the losses for which selections may be made, as follows: "Other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

"Said alternate sections" refers to the alternate sections granted to the company from the lake to the sound. It is claimed that, by implication, section 4 divides the indemnity belt into sections of twenty-five miles. As we have shown, that section is directory and not mandatory; it applies to "place" and not to "indemnity" lands. It confers the privilege upon the company to have its patents at that date or, at its option, to wait until other sections, or the entire road, is completed, and then receive its patents. It is further claimed that, because the place limits are half the width in the states that they are in the territories, it is implied therefrom that the indemnity in the states should only be half of that in the territories; or that the indemnity belt was, by implication, bounded by state or territorial lines. The express limitation in reference to place lands, without any such limitation relating to indemnity lands, is conclusive that no such limitation was intended. The enumeration of certain limitations is the exclusion of all others not enumerated. The grant to the company is of a designated number of sections of land, if they were ever in place.

The grant attaches to the place lands at the date of the filing of the map of definite location, with the privilege to the company of selecting, wherever to be found in the indemnity belt, for all the losses in the place limits. The right to make selections is conferred in general terms. No limitations are inferable by implication, or otherwise, except such as are expressly prescribed. The supreme court of the United States, in relation to a grant, in so far as the question of construction is concerned, in all respects like that of the Northern Pacific, said:

"As to the intent of Congress in the grant to the plaintiff, there can be no reasonable doubt. It was to aid in the construction of the road by a gift of lands, along its route, without reservation of rights, except such as were specifically mentioned."

Missouri, etc., R. R. Co. vs. K. P. Ry. Co., 97 U.S. 497.

Tested by the above rule of construction of statutory grants, the question, in so far as the Northern Pacific is concerned, is easy and plain. First, from it, it is apparent that the grant of lands is intended to be along its entire road. Second, the grant is without reservation of right to the government except such as are specifically mentioned. In the grant to the Northern Pacific there is no specific mention of political divisions or twenty-five mile sections in so far as the indemnity limit is concerned. In the Burlington & Missouri River Railroad grant, it was held that, in making the indemnity selections, the company could go at right angles to the road at any distance necessary to secure the indemnity lands.

"There is here no limitation of distance from the

road within which the selection is to be made, *and the court can make none.*"

United States vs. B. & M. R. R. Co., 98 U. S. 339.

Our contention is that there is no limitation in the indemnity limit except those specifically mentioned, to-wit: That the selections must be made along the alternate sections granted to the company and within ten miles thereof, except the further exception relating to mineral lands; and the court can make no other limitations than those expressly mentioned in the act. The case now under consideration is much stronger than that of the Burlington & Missouri River railroad. Here there are express limitations prescribed in the act limiting the company to selecting within a certain belt, and by the familiar rules of statutory construction, this express limitation is the exclusion of all others.

The intention of Congress in providing an indemnity belt in the granting act to the Northern Pacific, and in all similar grants, was, and is, to provide a limit in which the company or companies can make up for the losses in place lands. It should receive that construction which will enable the company in this broader belt to supply all the losses in the place limits. The rule is correctly stated in the note in 12 American and English Railroad Cases, after referring to a large number of grants, as follows:

"It is in the acts above referred to generally provided that, if upon the location of the road sufficient land is not left ungranted upon either side thereof within the prescribed limits to satisfy the railroad company's claim, it shall be entitled to sufficient land to make up the deficit within some broader limit."

12 Am. & En. R. R. Cases, p. 285.

The construction mentioned requires the interpolation after the words "odd numbers" and before the words "not more," in the third section of the act of July 2, 1864, of either "within the section of the road in which the loss occurred," or "within the state or territory in which the loss occurred," making the paragraph read as follows:

"Other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections and designated by odd numbers, within the section of road in which the loss occurred (or within the state or territory in which the loss occurred), and not more than ten miles beyond the limits of said alternate sections."

Such an interpolation is not warranted by any language found in the charter, is violative of the intent as clearly expressed therein, and the construction given by the department and the courts to similar grants.

In the case of Courtright *vs.* Cedar Rapids, etc. Co., the supreme court of Iowa said:

"The defendants claim that the selection should have been made beginning with the most easterly vacant lands in the grant and going west 20 miles. We observe nothing in the words of the law authorizing this construction. There is no direction as to the selection, except that it be confined within the limits of 20 miles along the road. No word or phrase is used indicating an attempt to express the will of the legislature to the effect claimed by defendants. To us it clearly appears that the location of the lands, within the 20 continuous miles around, was left to the choice of the railroad company. * * *

"Advantages are attempted to be pointed out to the government resulting from this manner of selection. We are unable to admit the force of the argument, or to see clearly the advantages to the United States which would result from choice of the lands upon the eastern part of the grant. But conceding that such advantages are real, Congress failing to secure them by express

words, we certainly can not interpolate such words by construction and thus create a reading for the statute which it does not in fact possess."

5 Am. Ry. Rep. 78.

The above opinion of the supreme court of Iowa was affirmed by the supreme court of the United States.

21 Wall. 310.

II.

Estoppel.

That the doctrine of estoppel applies to the government is too well settled to be questioned. Dec. 13, 1886, Judge Sawyer, Judge Sabin concurring, said:

"The interests of all these pre-emptioners and purchasers from the government, as well as of the parties holding under the railroad grants, and the interests of public justice, generally, require that this practical location of the vague, uncertain, impracticable eastern exterior boundary of the Moquelamos grant of 1855, acted upon by all departments of the government, by the public and even by the claimant himself, for nearly a quarter of a century, should not now be disturbed; that the government should be now estopped from alleging that it is, or should be, located elsewhere. That the law of estoppel in a proper case applies to the government. See

Clark vs. U. S., 95 U. S. Rep. 539, 544.

Branson vs. Wirth, 17 Wall. 42.

State vs. Milk, 11 Fed. Rep. 359, 397, and cases cited."

U. S. vs. McLaughlin, 30 Fed. Rep. 161–2.

Cohn vs. Barnes, 5 Fed. Rep. 326.

Adams Co. vs. B. & M. R. R. Co., 39 Iowa, 507.

Com. vs. Andre, 33 Pickering, 224.

Com. vs. Prop., 10 Mass. 155.

People vs. Soc., 2 Payne, 545.

State vs. Bailey, 19 Ind. 452.

People vs. Mainard, 15 Mich. 453.

Bigelow on Estoppel, 2d edition, p. 246, and authorities there cited.

Wells on Res Judicata and Stare Decisis, p. 4.

In 1865 the Northern Pacific Railroad Company, after examination of the route and in good faith, filed in the office of the interior department its map of general route and requested a withdrawal of the lands for its benefit. See letter of Secretary Usher on page 35 of the argument made by the undersigned Oct. 24, 1887.

The commissioner of the general land office refused to accept the map or withdraw lands thereunder for the reason that a survey had not been made and the route definately ascertained. Said map was clearly within the rule designated by the supreme court of the United States in the case of Buttz *vs.* N. P. R. R. Co., in which it was said:

"The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass."

119 U. S. Rep. 55.

The company was not able to furnish a map coming within the erroneous and technical ruling of the department until 1870. From 1865 to 1870 hundreds of homestead and pre-emption claims had been initiated, and many perfected, upon the odd numbered sections within the limits of the Northern Pacific grant; withdrawals had been made of land for other railroads; and other disposition had been made of government lands within said limits, involving hundreds of thousands of

acres, all of which said lands, by said erroneous ruling, are forever lost to the company. In 1871 the company applied to the interior department for the withdrawal of the lands in the second indemnity limit. It was refused, with the exception of the state of Minnesota. In 1883 the company made a second application for the withdrawal of lands within the said second indemnity limit. In answer to said application the secretary of the interior said:

"I am further of the opinion that, upon filing maps of approved definite location, withdrawal of lands within the indemnity limits should be made by you to the extent of the first indemnity limits. Such action will be in accordance with the practice heretofore pursued by your office in reference to withdrawals under the grant in question. I must decline to comply with the request of the company to cause withdrawal of the lands within the second indemnity limits in the territories. * * * As I am at present advised, I do not think it probable that the company will ever be obliged to resort to those limits for selection of lieu lands."

In said opinion and directions to the Northern Pacific, under which to make selections, the honorable secretary further said:

"Respecting the indemnity belt, it is to be observed that the object of the law is to give within its entire limit just what has been lost in place. * * * It was clearly the intention of the legislature that, within the indemnity limits fixed by the Northern Pacific acts, the company should have the opportunity to take lands, acre for acre, for all those lost in place."

2 Volume Decisions Interior Dept., p. 511.

Under said directions to the company prescribed by the secretary of the interior under the third section of the act of July 2, 1864, two propositions were settled.

First, that the company was authorized in making its selections, to select from only the first indemnity limit in the territories; and second, it was by the department decided that the company, in said indemnity and primary limits, was entitled to the entire amount intended to be granted, and was authorized to select in the indemnity limit acre for acre for the lands lost in the place limits. On May 23, 1884, the secretary of the interior further said:

"In my letter of May 17th last, I declined to withdraw from settlement any portion of the odd sections of land lying in the second indemnity limits within the territories, upon the ground that there did not seem to be any present necessity for such action in order to protect the company in its rights to lieu lands."

2 L. D. 508.

July 11, 1883, the secretary of the interior to Commissioner McFarland, among other things, said:

"Under the authority conferred and in discharge of the duty imposed upon me by the act, which provides that the selections should be made under the direction of the secretary of the interior, I deem it best to indicate at the outset what, in my opinion, the practice should be in relation to selections. The amount of lands lost within each of the states named should be made up by selections within such state, without regard to quality, if there be sufficient within the indemnity limits for that purpose. I do not think it was the intention of the granting act, nor do I deem it just or equitable to the government, or to the settlers, to permit the company to cull the lands within such limits, leaving portions unselected because they are poor, and then selecting other lands further along the line, in place of lands lost within the granted limits of those states. * * * And for lands lost * * * not made up by selections in that way, the company should be allowed to make selections elsewhere within the indemnity limits upon the line of said road."

From the above quotation, it is apparent that the in-

terior department then construed the act as authorizing the company to select in a state or territory other than that in which the loss occurred. At that time it was known to the interior department that in the states of Wisconsin and Minnesota, there would be, after exhausting the indemnity limits, a deficiency to be made up by selections in the territories. On May 28, 1883, the secretary prescribed specific directions under which selections were to be made under the grant to the Northern Pacific Railroad Company. In said directions, the honorable secretary, to the commissioner, among other things, said:

"In order to facilitate the work of making selections, I think you should instruct the local officers that when clear lists of selections, free from conflict or other objections, are filed with the district officers and approved by them, said selections should at once be marked upon their books and forwarded for final examination, leaving the ascertainment of the lands lost in place to your office instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company, as heretofore. I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice."

Prior to the issuing of said directions, under said former practice, the Northern Pacific Railroad Company, at great expense, filed most of its selection lists and in said selection lists designated the losses. In the selection lists filed in Dakota, losses of lands in Minnesota were specifically described, acre for acre. Said selections were, under the directions of the interior department, approved by the registers and receivers of the local land offices. Copies of the certificates of approval are set forth in the argument made by the undersigned, Oct. 24, 1887,

on pages 8 and 9 thereof. Upon the receipt of the above directions of the interior department, the company withdrew the lists of selections it had previously filed, eliminated therefrom the designation of losses, and refiled its lists containing the same selections. On the following day, after the promulgation of the directions above referred to, the commissioner of the general land office sent to the twelve district land officers along the line of the Northern Pacific railroad, specific directions as to the selection of indemnity lands. Said direction to each office was the same, except in the address. The one to the Fargo office reads as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON, D. C., May 29, 1883.

Register and Receiver, Fargo, Dakota Ter.:

When lists of indemnity selections, free from conflict or other objections, are presented by the Northern Pacific Railroad Company, *admit and note them on your records, and forward them, without requiring the designation of lands lost.* S. HARRISON,
Acting Commissioner.

Under section 3 of the act of July 2, 1864, the interior department is to prescribe the directions for selections of indemnity lands, and the company is to make the selections. Making the selections is not a joint act of the government and the company, but the act of the company. Justice Hoyt in the case of United State *vs.* N. P. R. R. Co Dec. 29, 1886, said:

"Was it the intention of the granting act that these indemnity selections should be made by the joint act of the secretary of the interior and the company? I think not, for to my mind such is not the reasonable and fair interpretation of the language used, to-wit.: 'Other lands shall be selected by said company in lieu

thereof, under the direction of the secretary of the interior,' which seems to me to clearly indicate that the company were to make the selections, and that all the secretary of the interior was to do in the premises was to provide rules and regulations under which such selections were to be made, and the evidence thereof made of record and preserved."

The foregoing are the directions prescribed by the secretary of the interior under said section 3, and are the directions under which most of the selections by the company were made, filed and approved. In said directions the registers and receivers are directed to admit and approve said selections. Under said directions it was, and is, the duty of the commissioner of the general land office to designate the losses in the mode prescribed by the secretary of the interior; and to require the company to exhaust the indemnity limits in the state or territory in which the loss occurred before going into any other jurisdiction. It goes without saying that after the directions for making the selections have been prescribed by the secretary of the interior, and the company, in pursuance of said directions, has made its selections, that the rights of the company attached. Neither the interior department nor any other department can add to or diminish such rights. The interior department, by other and different directions, issued after such selections have been made, can not increase the duties, obligations and burdens of the company.

"A contract by which the rights of one party, after performance on his part, would be at the absolute pleasure of the other, would be an anomaly."

St. P. & C. Ry. Co. vs. Brown, 24 Minn. Rep. 580.

At the time of prescribing the directions aforesaid, it was well known to the interior department that the

Northern Pacific Railroad Company could not, within many of the sections of the road in Washington territory, or within any of the sections of the road in Wisconsin and Minnesota, obtain from the indemnity limits the lands lost in place. The refusal to allow the company to go into the second indemnity belt in the territories; the assertion that it could make up at other places along the line of the road what it had lost in the sections where there were not sufficient lands in the indemnity limits, and the statement that the company should be confined to the political jurisdiction in which the loss occurred, provided there were sufficient vacant lands therein to make up the loss, clearly indicate that the company was authorized by the department to do precisely what it did—make selections in one political jurisdiction for losses in another. After the greater part of the selections had been made and approved as aforesaid, Commissioner Sparks directed that the company make its selections, and in its selection lists designate its losses. Such directions were applicable in so far as the selections had not been made, but could not affect the selections already made in pursuance of directions previously prescribed. The company's vested property rights can not be thrown from one side to another, like a shuttlecock, to suit the whim, caprice, or legal acquirements of the various officials in the interior department. Many lands in the indemnity limits subject to selection at the time the applications were made to withdraw said lands for the benefit of the company, have since been appropriated by bona fide pre-emption, homestead and other claimants. If the government had approved the map

of the company in 1865, and withdrawn the lands in the second indemnity belt in 1871 and 1883, as requested, the necessity would not have been so great for the company to go into the states and territories for indemnity lands other than that in which the loss occurred. It is the duty of the interior department to so administer the grant as to enable the company to obtain its full complement of land. The supreme court of Minnesota, in a case involving the right of selections, said:

"The commissioner of the land office was, therefore, not authorized to set apart to the institutions named any swamp lands except out of the surplus that should remain after prior grants and appropriations should be filled. And this was in strict accordance with honesty and good faith, for a contract by the state to convey to this plaintiff a designated number of swamp lands, and giving it the right to select, in order to make up deficiencies, from swamp lands outside of the designated limits, involves the obligation on the part of the state to retain for such selections, if it receive them, enough of such lands to give effect to the right of selection."

St. Paul & Chicago R. R. Co. vs. Brown, 24 Minn. Rep. 579.

The failure of the government to make the withdrawals and protect the indemnity limits for the company is a reason why the company should be permitted to go into a section or jurisdiction other than that in which the loss occurred, to make selections. In the Burlington & Missouri River grant, the supreme court said:

"In some instances good reasons may exist why a selection elsewhere ought to be permitted. If, as in the present case, by its neglect for years to withdraw from sale land beyond twenty miles from the road, the

land opposite to any section of the road has been taken up by others and patented to them, there can be no just objection to allowing the grant to the company to be satisfied by land situated elsewhere along the general line of the road."

U. S. vs. B. & M. R. R. Co., 98 U. S. Rep. 340.

Such a construction is warranted, not only by the language of the charter of the Northern Pacific, but by the construction placed thereon by the interior department, whose duty it was to construe the law, in 1883. If the interpretation now suggested had then obtained, and the lands been withdrawn in the second indemnity belt in the territories, and if the lands had been withdrawn in 1865, at the time of the filing the first map, when they ought to have been, perhaps there would have been no necessity for selecting in a jurisdiction other than that in which the loss occurred. By following the directions prescribed in 1883, thousands of acres of valuable lands have been lost to the company in the second indemnity belt in the territories.

If the departmental construction is now to be changed, and the company limited to the coterminus principle in selections, the records of the interior department show that the company will sustain irreparable damage. It will not be able to make up the deficit by several hundred thousands of acres. The selections made under the instructions in this argument, heretofore referred to, have all been approved by the registers and receivers, as directed by the secretary of the interior and the commissioner of the general land office. The approvals are all alike, and on file in the interior department. We will refer to but one of them, to-wit:

UNITED STATES LAND OFFICE,
FARGO, D. T., Oct. 8, 1883.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company, under the grant to the said company, by act of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company by Chas. B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the limit of fifty miles on each side; and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, state, or any other valid claim to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the act of Congress approved July 1, 1864, and contemplated by the circular of instructions dated Jan. 24, 1867, addressed by the commissioner of the general land office to registers and receivers of the United States land offices; and that the said company have paid to the undersigned receiver the full sum of thirteen and sixty-eight hundredths dollars, in full payment and discharge of said fees.

HORACE AUSTIN, *Register.*
E. C. GEARY, *Receiver.*

After making said selections under said directions, and the approval thereof as aforesaid, the company commenced the sale of its indemnity lands so selected and approved. In Dakota alone, it has sold over 200,000 acres thereof. Twenty villages are located thereon. Thousands of people have their homes upon said property. They have invested in permanent and valuable improvements upon said lands millions of dollars. They

made their purchases, erected their homes, invested their money and labor in improvements in good faith, relying upon the construction and directions of the secretary of the interior above mentioned. It is now too late to change. All the elements of estoppel against the government are embodied in the foregoing facts. Affirmative, positive action relied upon by the company and the people continued for so many years, under which property rights have grown up, presents a case coming within the authorities heretofore cited.

3. Res Judicata.

It is not necessary to repeat the decisions of the secretary of the interior set forth under the head of estoppel. It is apparent therefrom that the interior department, when called upon to act in the matter, did decide that the railroad company could select lands in a state or territory other than that in which the loss occurred, and that under said decisions and directions, the greater part of the selections pending for patent in the interior department were made. No new facts are suggested; a review is not asked by any person. In such a case, the authorities all agree that it is the duty of the secretary of the interior not to review the decisions of his predecessors, when acted upon by the parties interested, but to execute and carry them into effect, and if wrong, leave it to the courts to settle.

See authorities cited in the argument of the undersigned, made Oct. 24, 1887, on pages 11, 12, 13, 14, 15, 16, 20, 21, 22, 23, 31, 32, and 42.

St. Paul, Dec. 24, 1887.

James McNaught,
Counsel N. P. R. R. Co.